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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Palladium Books, Inc.

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Serial No. 75/199,600

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Lawrence R. Jordan and Peter M. Falkenstein of Seeligson, Jordan, Deloof & Hopper for Palladium Books, Inc.

Barney L. Charlon, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Seeherman, Hairston and Rogers, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Palladium Books, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register CYBER-KNIGHT as a trademark for "role playing game equipment in the nature of game book manuals" in Class 28.[1] Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that

[1] Application Serial No. 75/199,600, filed November 18, 1998, and asserting first use and first use in commerce in August 1990.

applicant's mark so resembles the following marks, previously registered by the same individual, that when used on applicant's goods, it is likely to cause confusion or mistake or to deceive:

> CYBERKNIGHT, registered for "entertainment services, namely, a continuing children's show distributed over television, cable, satellite, radio and global computer information networks; electronic publishing services, namely publication of text and graphic works of others on CD-ROMs featuring children's entertainment; production and distribution of motion pictures, publication of books and magazines, television show production, television show programming, and videotape production";[2] and
>
> CYBER KNIGHT, registered for motion picture films featuring adventure stories.[3]

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

[2] Registration No. 2,162,346, issued June 2, 1998.
[3] Registration No. 2,234,446, issued March 23, 1999.

similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, they are essentially identical. Although applicant's mark has a hyphen between the words CYBER and KNIGHT, and the registered marks are depicted in one case as two words and in the other with the words telescoped, these slight differences are not significant in terms of the appearances of the marks, and they do not affect the identical pronunciation, connotation and commercial impression of the marks.

The fact that the marks are identical "weighs heavily against applicant." **In re Martin's Famous Pastry Shoppe, Inc.**, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). When the marks in question are identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." **In re Shell Oil Co.**, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Thus, when marks are identical, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. **In re Concordia International Forwarding Corp.**, 222 USPQ 355 (TTAB 1983).

Bearing this in mind, we turn then to a consideration of the goods and services of applicant and the registrant. Applicant argues that the goods and services are different because applicant's role-playing games are aimed at teenagers and young adults, not children, while the registrant's services are children's television shows or movies. As a result, applicant asserts that there would be no overlap in the consumers of the respective goods and services.

We need not decide whether teenagers (part of the consuming group for applicant's goods) would be considered children and/or whether the "children's show" and "children's entertainment" identified in Registration No. 2,162,346 would encompass an audience of teenagers.[4] This is because the registrant's services are not restricted to children. Registration No. 2,162,346 includes in its identification "production and distribution of motion pictures, publication of books and magazines, television show productions, television show programming," while

[4] The Examining Attorney contends that because there are no limitations on the classes of consumers for applicant's goods, they must be presumed to include all potential customers. Although this statement is correct in the abstract, we can assume, from the very nature of the goods, that applicant's role-playing game book manuals would not be sold to or used by young children, in the same way that we can assume, by the very nature of the product, that liquor would not be purchased or used by children.

Registration No. 2,234,446 is for "motion picture films featuring adventure stories." As a result, we must deem those services to include the production of motion pictures, books and television shows directed to persons of all ages, including teenagers and young adults.

In support of his position that the goods and services are related, the Examining Attorney has made of record several third-party registrations generally encompassing publications and such services.[5] The most relevant are Registration No. 1,902,684 for, inter alia, "books for children and teens" and "entertainment services in the nature of a television series"; Registration No. 2,074,960 for, inter alia, "comic books," " role playing games," and "entertainment, namely, the production and distribution of motion pictures, television programs and plays"; Registration No. 2,425,175 for a "series of fiction books" and "entertainment services, namely, a series of science fiction television programs"; Registration No. 2,393,115 for, inter alia, "series of fictional books" and "entertainment, namely a continuing news and entertainment

[5] The Examining Attorney also submitted certain third-party applications. We have given these applications no consideration, because they have no probative value in our determination of likelihood of confusion, being evidence only of the fact that they were filed.

show concerning angels, adults and children, distributed over television, satellite, audio and video media."

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

Moreover, it is common knowledge that there is a merchandising relationship between books, games, movies and television programs. Books are often adapted into movies or television programs, while names of movies, or of characters in movies, may become trademarks for games, books or television series, and a game name may become the title of a movie.

As a result, consumers viewing applicant's mark CYBER-KNIGHT for role-playing game manuals are likely to believe that there is an association or connection as to source, such as through a licensing agreement, when they see the virtually identical marks CYBER KNIGHT for motion picture films featuring adventure stories and CYBERKNIGHT in connection with the production and distribution of motion pictures, publication of books and magazines,

television show production, television show programming, and videotape production.

In reaching this conclusion, we have considered applicant's argument that the consumers of role-playing games "comprise an insular group of devotees who are extremely sophisticated in their knowledge of the companies that produce these games and in their choices as to whose games to purchase." Brief, p. 3. While this may be true, it is difficult to see how even a discriminating purchaser would note the differences between the virtually identical marks CYBER-KNIGHT, CYBER KNIGHT and CYBERKNIGHT, or assume that CYBER-KNIGHT represents a source different from that of CYBER KNIGHT or CYBERKNIGHT simply because of the hyphen in applicant's mark. In fact, because applicant's goods may be sold in different venues from the registrant's services (applicant states that it markets its products primarily through bookstores, gaming stores and mail order, brief, p. 5), consumers would not have the opportunity to make a side-by-side comparison of the marks. Although we believe it is unlikely that consumers will note whether CYBER-KNIGHT is depicted with or without a hyphen, if they were to notice this minor difference they might well ascribe the difference to the fact that the mark was being

used in connection with a different medium, e.g., a motion picture.

We also note that there is no evidence of third-party use or registration of the mark CYBER KNIGHT/CYBERKNIGHT. Thus, we must regard the registered marks as strong marks which are entitled to a broad scope of protection.

Applicant points out that there is no evidence of the fame of the registrant's marks. Such evidence is difficult to produce at the ex parte examination level, and the lack of such evidence, although not a factor favoring a finding of likelihood of confusion, certainly does not militate against such a finding. In other words, the lack of such evidence must be considered neutral in terms of our analysis.

Finally, applicant points out that there is no evidence of actual confusion in the record. Aside from the fact that such evidence is difficult to obtain, this is an ex parte proceeding, and therefore we have had no opportunity to hear from the registrant as to what his experience has been.

Decision: The refusal of registration is affirmed.